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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

AMERICAN GUILD OF VARIETY ARTISTS,

Petitioner,

v.

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, American Guild of Variety Artists, hereby respectfully requests this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment of that Court entered on August 9, 1965, reversing a judgment of the United States District Court for the District of Minnesota which directed a verdict in favor of petitioner (defendant below) on one cause of action and granted judgment N.O.V. for the petitioner after a jury verdict in favor of respondent (plaintiff below) for $21,000 on a second cause of action. Petition for rehearing was denied on September 9, 1965.

Jurisdiction

The jurisdiction of the Court is invoked under Sections 1254(1) and 2101(c) of Title 28, United States Code.

Summary Statement of the Matter Involved

Background

Your petitioner, American Guild of Variety Artists, (hereinafter AGVA) is a labor union whose members are performers in the variety field of entertainment, which includes circus performers (916-917). National headquarters are maintained in New York City with branch offices located throughout the nation, including Minneapolis, which latter branch covers parts of Wisconsin, Iowa, North and South Dakota, and Canada (T915).

Respondent, William Smith, was franchised by the union from 1957 to and including 1962 to produce shows and circuses employing only AGVA members (T920). Under his franchise he agreed, among other things, to:

1. Not to require any AGVA performer to work with any non-union performer or in violation of AGVA's rules.
2. Deposit adequate security with AGVA to cover wages and welfare contributions for performers.
3. To pay the performers' salaries on the job not later than the day following each weekly engagement.
4. To make welfare contributions weekly for each performer.
5. To engage performers on AGVA standard form contracts.

In May of 1962, without first posting wage and welfare security with AGVA, and with a total working capital of

$2,100, respondent set out from Minneaposis with a troupe of AGVA members on a circus tour through the provinces of Canada and on up into Alaska. Plagued by continuing financial problems, respondent abandoned the performers in Edson, Alberta, on June 15, 1962, owing approximately $20,000 in wages to AGVA members and unpaid welfare contributions (T292-302).

Upon returning to Minneapolis, the unpaid performers complained to AGVA and respondent was placed on the union's "unfair list" for non-payment of salaries due members and failure to make welfare contributions (T965) and Smith was duly notified of this action.

Undismayed by the debacle in Canada, and knowing full well that AGVA would forbid its members to work for him again until back wages and welfare had been paid and security posted for future wages, respondent contracted to produce a circus at seventeen county fairs, commencing with the Rice County Fair at Faribault, Minnesota, on July 28, 1962 (T11-18).

In late June 1962 respondent was told by Meyers, Branch Manager for AGVA in Minneapolis, that he would have to pay the back wages and welfare and deposit adequate wage security before AGVA would consent to its members performing in plaintiff's circus at the seventeen county fairs. Respondent ignored AGVA's warning and went ahead with plans to produce a circus at Rice County Fair at Faribault, Minnesota, on July 28 and 29, 1962 with non-union performers.

The Basis of the Alleged Causes of Action

Prior to July 28, 1962, a meeting of the Rice County Fair Board was held at Faribault, attended by respondent and Meyers, in the course of which Meyers told the Board that respondent had breached his collective bargaining agreement with AGVA and that no union performers would be permitted to appear unless respond-

ent paid the back wages and welfare and posted adequate security for future wages, failing which Meyers urged the Fair Board to cancel respondent's contract. Respondent stated that he would put on his show with non-union acts (T521). The Board refused to cancel respondent's contract and decided to allow him to go ahead with non-union acts.

On July 24, 1962, Meyers notified the seventeen county fair boards with whom respondent had contracts that plaintiff had been placed on AGVA's unfair list and no union acts would be allowed to appear in respondent's circus.

On July 26, 1962, while preparations, including advertising, were under way for the opening of respondent's circus, AGVA put a picket line of four to six performers in the vicinity of the grandstand inside the Rice County Fair Grounds, where the circus was to perform. There was no picketing at the entrance to the fair grounds or elsewhere. Banners were carried reading (T982):

> "Do Not Patronize Circus at this Fair. Producer Unfair to A.G.V.A.—American Guild of Variety Artists, A.F.L.-C.I.O."

Picketing was peaceful (T471) and continued through the afternoon and evening of July 28th and ended about noon on Sunday, July 29th (T845, 984).

Respondent's circus, using non-union performers, played on Saturday afternoon, July 28th, as scheduled (T76).

After the initial performance the Rice County Fair Board cancelled respondent's contract including the remaining performances (1) because the show was no good and (2) because respondent produced only twelve instead of the twenty acts called for in his contract (T528, 529).

Subsequently the other sixteen County Fair Boards cancelled their contracts with respondent.

Aside from wiring the other sixteen county fair boards that respondent was on its unfair list, which it had an undisputed right to do, AGVA took no action whatsoever so far as respondent's performance thereat was concerned. Respondent released one of the remaining fair boards from its contract (T591); another fair board cancelled its contract on its lawyer's advice (T615). As for the remaining fourteen fair contracts, no evidence whatsoever was offered in support of respondent's claim that AGVA's action was the cause of cancellation.

Respondent's causes of action were based respectively on (1) violations of 29 U.S.C.A. § 158(b)(4)(ii) by secondary boycott and (2) wrongful interference with contractual relations between respondent and the seventeen county fair boards.

At the close of all the evidence, the Trial Court, upon petitioner's motion, directed a verdict in favor of petitioner on the secondary boycott cause of action holding as a matter of law that the picketing was primary.

After verdict, the Trial Court ruled that this was a labor dispute within the meaning of 29 U.S.C.A. § 152(9) hence the picketing was privileged and did not constitute a tortious interference with respondent's contract with the County Fair Boards. Judgment N.O.V. followed.

Questions Presented

(1) Was the trial court correct in ruling as a matter of law that peaceful picketing against the primary employer in support of lawful union demands, in the area of a common situs where the primary employer is conducting his normal business, is primary, and on the strength of such a ruling, directing a verdict in favor of the petitioner on a cause of action for alleged secondary boycott under 29 U.S.C.A. § 187 and 29 U.S.C.A. § 158(b)(4)(ii).

(2) Was the trial court correct in ruling, as a matter of law that lawful primary picketing is not tortious interference with contract and, on the strength of such a ruling, granting judgment in favor of petitioner notwithstanding a jury verdict for $21,000 in favor of respondent on a cause of action for alleged wrongful interference with contract.

Specification of Errors

The United States Court of Appeals for the Eighth Circuit erred:

(1) In reversing the order of the trial court at the close of all the evidence directing a verdict in favor of the defendant on the secondary boycott cause of action and the judgment entered thereon.

(2) In reversing the order of the trial court and the judgment entered thereon granting judgment N.O.V. to the defendant.

Reasons Relied Upon for Allowance of Writ

(1) In reversing the judgment of the District Court, the Court of Appeals for the Eighth Circuit is in direct conflict with the decisions of this Court relating to the meaning and application of 29 U.S.C.A. § 187 and 29 U.S.C.A. 158 (b)(4)(ii).

United Steel Workers of America v. *N.L.R.B.*, 376 U. S. 492, 84 Sup. Ct. 899 (1964);
Local 761, International of E. R. & M. Workers v. *N.L.R.B.*, 366 U. S. 667, 81 Sup. Ct. 1285 (1961).

The picketing was directed at the primary employer who was compounding his recent earlier default in wages and welfare contributions to the tune of $20,000, by openly and

brazenly flouting the terms of his collective bargaining agreement with AGVA covering the circus at the fair.

The picketing was confined to the place where respondent's circus actually performed, i.e., the grandstand area *inside* the Fair Grounds. Had AGVA intended to execute pressure on the secondary employer, i.e., the Fair Board as respondent contends, surely it would have picketed the entrance to the fair ground or the Fair generally.

No attempt was made to interfere with the business of the Fair Board or to prevent or persuade employees of the Fair Board or any one else from entering or leaving the grandstand area on July 26th or 27th. The pickets' banners carried no reference to the automobile thrill show or the wrestling matches shown in that area on the 26th and 27th. The banners clearly referred to respondent's circus which had been advertised to, and did open on July 28th.

Since it is common knowledge that "advance billing" is of the warp and woof of show business, it strains reason to say as did the Court of Appeals, that the law compelled the union to stand idly by on July 26th and 27th while respondent set the stage and advertised the opening of his circus on the 28th.

Indeed, how could AGVA protest effectively against the flagrant, unfair labor practices of respondent other than by picketing *in advance* of the show. Obviously, it would have been a waste of time and effort for AGVA to put out a picket line on July 28th *after* the show had commenced and the audience was inside.

If advertising and preparation of the stage is a part of show business, as surely it is, how can it be wrong for a union to have picketed the situs where respondent was conducting this part of his normal business. Where else and how else could petitioner have picketed effectively in these circumstances.

In these circumstances the union's action was a reasonable and lawful use of economic pressure directed against the primary employer, *not the Fair Board*, to compel him to live up to his collective bargaining agreement with the union.

The undisputed facts herein lend no aid to respondent's contentions.

Both the District Court and the Court of Appeals found that the Fair Board cancelled respondent's contract after the one matinee performance on July 28th because the show was no good and respondent had breached his contract with the Fair Board by producing only twelve instead of the twenty acts called for in the contract. Clearly the action of the Fair Board was not influenced or dictated by any act of the petitioner. Quite the contrary. Prior to seeing respondent's show, the Fair Board had refused flatly to cancel respondent's contract at the union's request, even though admittedly he was in flagrant violation of his collective bargaining agreement with AGVA. The promptness with which the Board acted to cancel respondent's contract after only one show, viewed in context with its earlier adamant refusal to cancel at the union's request, can lead rationally to but one conclusion: it was the poor quality of the show and the paucity of acts and not the picketing or any other act of the union which caused the cancellation.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion of the District Court is set forth as Appendix A, and the opinion of the Court of Appeals for the Eighth Circuit is set forth as Appendix B.

ARGUMENT

I

The trial court correctly held as a matter of law that the dispute between petitioner and respondent was a labor dispute, 29 U.S.C.A. § 152(9). The objective of the strike was to exert direct economic pressure on the respondent, the primary employer, in support of lawful demands that he comply with the terms of his collective bargaining agreement with the Union, hence it was a lawful strike and not a tortious interference with respondent's contract with the fair.

In the second count of his second cause of action respondent alleged that petitioner had tortiously interfered with his contracts with the seventeen Fair Boards. The trial court granted judgment for petitioner N.O.V.

In sum the trial court ruled that although lawful picketing inherently interferes with contracts, it is an activity protected by the labor statute and, therefore, cannot be the basis for a claim of tortious interference with contract, hence there can be no fact question as to justification. Since we are in thorough agreement, we will not labor the point.

The Court of Appeals, in a strict literal application of the standards laid down by the N.L.R.B. in *Sailors Union of the Pacific, AFL and Moore Dry Dock Company,* 92 N.L.R.B. 547, ruled that the picketing was not lawful primary picketing because respondent's circus was not actually playing in the grandstand area on July 26th and 27th or so a jury might have found, and went on to conclude that, this being so, the union's activities were not protected by the labor statute and could have been found by the jury to be tortious interference with contract. To bolster its conclusion the Court of Appeals cited what it called "substantial evidence" of threats of physical harm by Meyers against the non-union performers which carried the union's activities "well beyond peaceful pri-

mary picketing. The record discloses only that, at the most, some relatively mild statements were made which had no effect on the bearers (T720, 734, 633, 634, 657, 662, 574, 528, 529, 581, 709, 710). Be this as it may, the non-union members were undeterred by the alleged threat of physical violence.

The conclusion reached by the Court of Appeals is directly contrary to the rulings of this Court in:

Local 20, Teamsters, Chauffeurs and Helpers Union v. *Morton*, 377 U. S. 252, 84 Sup. Ct. 1253;
United Steelworkers of America v. *N.L.R.B.*, 376 U. S. 492, 84 Sup. Ct. 899;
Local 761, International of E. R. & M. Workers v. *N.L.R.B.*, 366 U. S. 667, 81 Sup. Ct. 1285;
N.L.R.B. v. *International Rice Milling Co.*, 341 U. S. 665, 71 Sup. Ct. 961.

The Court of Appeals for the Eighth Circuit erred in reversing the judgment N.O.V. for petitioner on the claim of unlawful interference with contract.

II

The trial court correctly held as a matter of law that the picketing was lawful primary picketing and, therefore, not a violation of 29 U.S.C.A. § 158(b)(4)(ii).

> "The legislative history of § 158(b)(4) frequently referred to as the 'secondary boycott section,' makes it compellingly clear that the evil sought to be eliminated by this legislation was not lawful primary activity, but those union activities which embroil some neutral employer in a labor dispute not of his own making, thus penalizing an unoffending employer to his damage."
>
> *Local 978, United Bro. of Carpenters & Joiners* v. *Markwell*, 305 F. 2d 38 (8th Circuit, 1962).

Certainly there was no showing here that the unoffending employer the Fair Board, was damaged or penalized as a result of any act of petitioner.

Nor is there any showing that respondent suffered any loss or damage as a result of any of AGVA's conduct, lawful or otherwise. The proof is exactly to the contrary. The Fair Board refused to cancel respondent's contract at the request of the petitioner. Nor, as we have said above, were the non-union performers deterred by the alleged threats.

It was no unlawful conduct of petitioner which caused the other sixteen Fair Boards to cancel respondent's contract. Although the record is silent on this, it may well have been that they reacted to the poor quality of respondent's show.

In the *United Steelworkers* case (*supra*), this Court said at 376 U. S. 492, 499, 501, that the distinction between primary and secondary picketing rests upon the type of work being done by the picketed secondary employees. The record is barren of any proof that the picketing interfered with any employees of the Fair Board in the performance of any of their duties.

It is perfectly clear from the undisputed facts that the picketing in this case was designed and intended to exert lawful economic pressure on respondent, the primary employer, in the only available fashion, in order to compel him to comply with the terms of his collective bargaining agreement with the union.

The record is barren of any showing that the picketing was intended to or did in fact interfere in any way in the normal business intercourse between the Fair Board and respondent.

There is no evidence to support the Court of Appeals finding that the picketing interfered with the July 26th and 27th grandstand shows and the grandstand concessions.

The pickets' banners referred only to respondent's circus. No attempt was made to dissuade customers from patronizing the shows in progress on the 26th or 27th, or the concessions.

In the light of the rulings of this Court in the cases cited under Point I of this brief, the trial court properly ruled as a matter of law that this was a labor dispute in which the picketing was directed against the primary employer in an effort to exert lawful economic pressure on him to compel him to comply with his collective bargaining agreement with the union, hence was not in violation of 29 U.S.C.A. § 158(b)(4)(ii).

Conclusion

To sum up, if the picketing was primary and otherwise lawful, both of respondent's causes of action must fall as a matter of law since there would be neither a violation of 29 U.S.C.A. 158(b)(4)(ii) nor a tortious interference with a contractual relationship.

The petition should be granted and the writ issued.

Respectfully submitted,

WILLIAM POWER MALONEY,
Counsel for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA,
FOURTH DIVISION.

WILLIAM SMITH, doing business as Smith Entertainment Agency and as Smith & Dale Circus, Plaintiff, *vs.* AMERICAN GUILD OF VARIETY ARTISTS, Defendant.	ORDER No. 4-62-Civ. 365

CONRAD J. CARR and JEROME G. RAIDT, Attorneys for Plaintiff

LEO DORFMAN and DORFMAN, RUDQUIST, JONES & RAMSTEAD, Attorneys for Defendant

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Defendant has moved for judgment notwithstanding the verdict or in the alternative for a new trial.

The Court has considered the briefs and arguments of counsel.

On all the files and proceedings herein,

IT IS ORDERED:

1. That the motion for judgment notwithstanding the verdict is granted.
2. That the alternative or conditional motion for a new trial is denied.

July 23, 1964.

/s/ EARL R. LARSON
United States District Judge

Memorandum attached.

Appendix A.

MEMORANDUM

This case arises out of certain events which transpired in Minneapolis and at Faribault, Minnesota, during the period between July 20 and July 28, 1962. These events in turn are understandable only with reference to certain happenings in Minneapolis and Canada during the spring of 1962.

Beginning in 1956 the plaintiff produced circuses or grandstand shows for fairs and various kinds of celebrations. In the spring of 1962 plaintiff set out for Canada with a group of acts to fulfill contracts he had there and in Alaska. Things did not go well in Canada and plaintiff eventually left the acts and returned to Minneapolis. Plaintiff, as a "producer," was a party to a collective bargaining agreement (The National Code of Fair Practices) with the defendant American Guild of Variety Artists (hereinafter referred to as A.G.V.A.). There was much controversy as to what occurred on the Canadian tour and who was at fault for the troubles the tour experienced, but it was undisputed that plaintiff breached his agreement with defendant before and during the tour.

Under the contract plaintiff was obligated to deposit and maintain cash security to cover compensation, transportation and welfare fund contributions for the performers (paragraph 7). The plaintiff did not post the security prior to leaving on the tour as he was supposed to do, nor did he make the deposit while he was in Canada, though the defendant requested him to do so. The deposit amount which was dicussed between the defendant's representative and plaintiff was $5,000, which figure was established because this was approximately the amount of the first week's salaries for the tour. Plaintiff had about $2,100 in cash when he left for the Canadian tour. Plaintiff was obligated to pay the performers their salaries at the end of each week (paragraphs 22 and 31). He failed to do this,

and when he left the tour in Canada he owed the performers between $15,000 and $20,000 in back wages. Under the agreement plaintiff was to make payments to the A.G.V.A. Welfare Trust Fund (paragraph 28) and Supplemental Welfare Fund (paragraph 29). He did not meet these obligations.

The plaintiff had seventeen contracts with County Fair Boards in Minnesota, Iowa, Wisconsin and Michigan to produce circuses during the summer of 1962. The first of these contracts was Faribault, Minnesota, for July 28 and 29. Toward the end of June plaintiff conferred with Herbert Meyers, defendant's local representative. Meyers told plaintiff that he could not commence his seventeen fair tour unless he made arrangements to pay the back salaries owed the performers from the Canadian tour. Plaintiff did not do this and was placed on the A.G.V.A. "unfair list." The seventeen fairs which had contracted with the plaintiff were notified of this by telegram.

With the approach of the Faribault performance, Meyers began negotiations with the Rice County Agricultural Society (hereinafter referred to as the Fair Board), the governing body of the Faribault fair, in an effort to persuade the Board to break its contract with the plaintiff, since plaintiff would be picketed at the fair and would have difficulty putting on a show.* The efforts of Meyers to persuade the Board to break its contract with plaintiff were unsuccessful and defendant began to picket. The picket line was established at the grandstand on the fair grounds, the legends on the placards carried by the pickets

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* There was much conflict in the testimony as to the manner in which Meyers conducted these negotiations. His personality was at the opposite pole to those represented on the Fair Board. He apparently showed neither tact nor wisdom; however, it would be unrealistic to exect these negotiations to be carried out according to the rules of etiquette.

stating that plaintiff was unfair to the defendant. Union members would not cross the picket lines, and plaintiff was unable to fulfill his contract with the Rice County Fair Board to put on a twenty act circus. The contract was then cancelled by the Fair Board and plaintiff did not perform at any of the other sixteen fairs.

Plaintiff commenced an action against defendant based on three claims:

First cause of action—

1. Defendant failed to arbitrate the dispute over back wages and welfare fund payments as required by paragraph 10 of the Collective Bargaining Agreement.

Second cause of action—two counts

1. The picketing at Faribault was a secondary boycott, proscribed by 29 U.S.C.A. § 158(b)(4) (1963 Supp.), for which defendant is liable in money damages under 29 U.S.C.A. § 187(b).

2. Defendant, through Herbert Meyers' negotiations with the Fair Board and the picketing, tortiously interfered with plaintiff's contractual relations with the Rice County Fair Board and with the sixteen other fair boards with whom plaintiff had agreements.

The case came on for trial before the Honorable Edward J. Devitt on October 15, 1963. A jury verdict for $15,000 was returned against defendant, and Judge Devitt granted defendant's motion for a new trial, holding that the evidence was insufficient to sustain a verdict for over $3,000 (representing the loss caused by the Faribault cancellation). During the trial Judge Devitt dismissed plaintiff's first cause of action as to failure to arbitrate.

At the second trial this Court also dismissed the first cause of action; since there was no dispute as to plaintiff's liability, there was no arbitrable issue. In addition,

defendant's motion to dismiss the first count of the second cause of action pertaining to the alleged secondary boycott was granted.* Jurisdiction over the common law ground was retained under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933). The case was submitted to the jury on the common law question alone, and a verdict for $21,000 was returned against defendant. Defendant had moved for a directed verdict and timely moved for a judgment N.O.V. Its motion is based on four grounds:

1. Plaintiff did not prove he was injured by defendant's unlawful interference with his contract with the Rice County Fair Board or with his contracts with any of the other sixteen County fair boards;

2. There was no competent evidence from which the jury could find that the plaintiff sustained damages;

3. The Court, having dismissed the secondary boycott count of the plaintiff's second cause of action, lacked jurisdiction over the common law count;

4. The Court's interrogation of certain witnesses was prejudicial error.

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* To summarize the basis for this decision: The dispute between plaintiff and defendant was a labor dispute witthin the meaning of 29 U.S.C.A. § 152(9); the strike had the objective of placing direct economic pressure on the primary employer, Smith, in order to resolve the dispute arising from his breach of the collective bargaining agreement. Such a strike in support of lawful demands is permissible.

The common situs situations present the most difficult problems of distinguishing between primary and secondary activity. The instant activity was not directed at the Fair Board but at the primary employer. The manner of picketing met the standards for lawful primary activity set out in *Matter of Sailors' Union of the Pacific* (Moore Dry Dock), 92 N.L.R.B. 547, given the rather unusual business involved in the instant case.

Plaintiff argued that defendant "threatened, coerced or restrained" certain persons. The picketing was primary and did not become illegal secondary activity even if threats were involved. *United Steelworkers of America* v. *N.L.R.B.*, 376 U. S. 492 (1964).

Appendix A.

1. Defendant argues as to the third ground of its motion that where a secondary boycott count is joined with a common law count and the Court dismisses the secondary boycott count on the merits, it lacks jurisdiction over the common law count. Frankly conceding that there is no authority supporting its position other than the recent Supreme Court decision in *Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton,* 84 S. Ct. 1253 (1964), the defendant takes the position that the *Local 20* case compels this Court to grant its motion.

The holding of that case does not support defendant's argument. In the *Local 20* case a secondary boycott count was joined with a common law damage count. The District Court awarded damages for the secondary boycott and also awarded damages for a violation of Ohio law which did not fall within the secondary boycott provisions of the Federal labor law. It was the latter award which was the subject of the Supreme Court's discussion, and the Court pointed out that the type of activity proscribed by Ohio was permitted by Federal law as part of the balance struck by Congress when it legislated in the secondary boycott area. The State law thus frustrated the Congressional policy, and a damage award under it could not be sustained in view of the Federal occupation of the field. The Court said that the doctrine of pendent jurisdiction was "of no service" in the case because a State court would also be without authority to award damages in a *Local 20* situation.

In the instant case it was determined after plaintiff had presented his evidence that there was no secondary boycott, hence there is no issue of Federal pre-emption and the *Local 20* case is inapplicable. The important legal question in this case concerns the relationship between primary picketing, proper under Federal law, and the common law tort of interference with contractual relations.

Appendix A.

The jurisdictional issue is solely one of pendent jurisdiction (the issue which was *not* in *Local 20*).

2. It is plaintiff's theory that defendant, through Herbert Meyers' approaches to the Fair Board and through the picketing, unlawfully interfered with plaintiff's contractual relations with the Fair Board. Furthermore, because of the incidents at Faribault and the telegrams defendant sent out to the various fair boards stating that plaintiff was on the A.G.V.A. unfair list, plaintiff claims that defendant interfered with plaintiff's contractual relations with each of the sixteen other fair boards.

The case thus makes it necessary to explore the uncertain area where a union's right to picket becomes the actionable tort of unjustified interference with contract. Commercial torts are becoming an increasingly important area in the law, see Note, 77 Harv. L. Rev. 890 (1964), and this Court has recently explored at length the Minnesota law on interference with contract and inducement of breach of contract. See *Continental Research, Inc.* v. *Cruttenden,* 222 F. Supp. 190 (1963). The motive of the defendant stands out as the major liability producing factor, and the instructions in the instant case focused on this factor. Yet the law of interference with contract which has developed in the various commercial contexts cannot be appropriately applied directly to the picketing situation since the actionable element in most cases—the defendant's intention to harm the plaintiff—is always present in a strike. The very purpose of a strike or picketing is to weaken the economic position of the employer.

> "The principal weapons which the unions have developed are the strike, the boycott and the practice of picketing. These devices are used to force the employer to shut down his plant or business either by depriving him of labor or of customers until compliance with the demands of the union is made. Con-

> tractual relations are, of course, interfered with, deliberately and intentionally by the defendant unions. *A prima facie tort is thus made out, that is, the union or its members are liable in damages . . . unless a legal privilege affords them immunity.*
>
> "The legal issue in labor disputes thus usually turns on the question of justification or privilege." 1 Harper and James, *The Law of Torts* § 6.13 pp. 523-24 (1958). (Emphasis added.)

The existence of a prima facie tort provided early courts with a convenient means to strike down unions. See Note, 46 Mich. L. Rev. 389 (1948). The reasoning which altered this situation has been well summarized by Justice Traynor:

> The interests of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. *Imperial Ice Co.* v. *Rossier,* 18 Cal. 2d 33, 112 P. 2d 631, 632 (1941).

The crux of the instant case is to what extent the actions of the defendant have exceeded its privilege, and it is on this point that plaintiff has failed to establish a case. As indicated above, the picketing was for lawful objectives, and it was carried on in a lawful manner.* The test of

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* There was no violence or other independently tortious conduct connected with the instant picketing. If this had been the case a different result might have to be reached here. See, *e.g., Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton,* 84 S. Ct. 1253 (1964); 1 Harper and James, *supra,* at 524: "[T]respass, assault and battery and wilful destruction of property are wrongful and not less so because done in connection with a strike or a picket line." Of course the instant case is differentiated from such situations because the tort complained of is an integral part of the lawful conduct rather than independent of it.

economic strength contemplated by our industrial relations system as a means of resolving conflicts between employers and unions may well result in one of the parties being brought to his knees although mutual self-interest and relative strength militates against such a result in the vast majority of cases. Yet this was the result in the instant case. The defendant's picketing resulted in plaintiff's inability to perform his contract. In furthering its own interests defendant harmed the plaintiff, but its conduct was privileged because carried out within the context of a legitimate labor dispute. 4 Restatement, *Torts* § 775:

> Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.

If the common law provided a remedy for the loser of such a dispute, then it would frustrate the labor policy. This it cannot do.

Plaintiff has largely based his case on what he deems to be the wrongful motives prompting Herbert Meyers, the defendant's branch manager. The evidence for such an argument was Meyers' conversations with the Fair Board. The verdicts in the two trials of this action demonstrate the danger of allowing a jury to speculate as to motivation in a situation where the labor dispute is legitimate. Holding the union liable for a common law tort which is a part of one of the collective bargaining weapons possessed by the union under the statute adds an element to the process which is bound to throw it out of balance. The *Local 20* case cautions against such a result; moreover, liability for peaceful picketing may well raise constitutional issues. Common law remedies have a function with reference to independently tortious acts or crimes, because of the im-

portance of the State interests involved. But, as pointed out above, the interference is assumed in picketing, the question is one of privilege.* Plaintiff might argue that the privilege is exceeded if the motivation is wrongful, and wrongful motivation is that which is aimed at harming the employer—at, for example, putting him out of business. Yet that is an objective clearly contemplated as legitimate by the labor statute. To allow the jury to decide a case such as the instant one is to ask them to make a distinction not recognized by the law. The result would be an exercise of whim unrestrained by instruction. Where the action causing the contract interference (in the instant case the lawful picketing) is protected by the labor statute, there can be no fact question as to justification.

Moreover, whatever Meyers' motives were, they were largely irrelevant. If the objective of Meyers' conversations with the Fair Board was to persuade it to cancel its contract with plaintiff, he was unsuccessful. The Board refused to cancel its contract with plaintiff after meeting with Meyers. The interference with the contract was a result of plaintiff's being placed on the unfair list. The defendant had a right to do this. Plaintiff could not fulfill his contract because he required union performers for

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* The discussion here has been in terms of privilege. Other phrasing could be used. In a suit against a musician's union by a booking agent claiming the union had notified its members not to accept or negotiate contracts with him, the court pointed out that there is a right of freedom from interference with contract but said: "It is not necessary to discuss the general aspects of this right . . . since the authorities generally recognize the equal if *not* superior right of union organizations in the interest of its membership to take steps appropriate and lawful to accomplish its purpose. *Some authorities consider the right of the union 'privileged' and others consider it an equal or superior right justifying acts not in themselves unlawful. Pelty* v. *Dayton Musicians Assoc.*, 153 N. E. 2d 218 (Ct. of Common Pleas—Mont. Co., Ohio 1958), aff'd 158 N. E. 2d 223 (Ct. of App. Ohio 1958). (Emphasis added.)

the kind of show he had promised to put on. These performers were not available to an "unfair" producer, and so the Faribault contract collapsed. But it is undisputed that Meyers' activities with the Fair Board had no effect.* The contract was cancelled because plaintiff could not perform.

Defendant's motion for judgment N.O.V. must be granted. As a matter of law, defendant's activities were justifiable interferences with plaintiff's contractual relations.

Conditional Ruling on Defendant's Motion for a New Trial

Defendant has moved in the alternative for a new trial.

Defendant argues that the evidence as to plaintiff's loss of profits from the seventeen contracts was speculative and conjectural, particularly since plaintiff's business was newly established, and that its motion for a new trial should, therefore, be granted.

At the outset it should be pointed out that defendant's characterization of plaintiff's business as "newly established" is inaccurate. While plaintiff had never produced a twenty act circus before, he had been profitably producing shows at fairs and other occasions since 1957, and it was thus reasonable to anticipate that he would realize some profits from the seventeen county fair contracts he had.

A great deal more evidence was presented at the second trial than at the first trial on the lost profits issue. At the first trial only one witness in addition to the plaintiff

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* Plaintiff has more or less assumed that there was something wrong with Meyers' meeting with the Fair Board. Meyers was entitled to notify the Fair Board (and the sixteen other Fair Boards) that the plaintiff was on the unfair list. He was also entitled to negotiate with the Fair Board with reference to the show going on without Smith, because such a resolution of the dispute was a means of furthering the best interests of the union members.

appeared, and he estimated plaintiff's net profit from the seventeen contracts. In granting a new trial Judge Devitt stated that while a verdict for up to $3,000 for the loss of the Faribault contract might have been sustained, "the estimates of loss made by the plaintiff Smith and the witness Smith were not, without more, sufficient to afford the reasonable certainty required by the law. . . ." Apparently in an effort to meet this deficiency at the second trial plaintiff called the representatives of several of the fair boards with whom plaintiff had contracts. These witnesses testified as to the financial arrangements (generally minimum guarantees and a division of the income over the minimum), previous experience at their fairs and, sometimes, with plaintiff, grandstand seating capacity and, in some cases, the weather. The witnesses were experienced as to their fairs and their testimony was competent, and provided adequate evidence, along with the other testimony, from which the jury could find with reasonable certainty the amount of profits the plaintiff would have made on the seventeen contracts. In its instructions the Court pointed out that damages should not be awarded if they were uncertain, contingent or speculative. It is interesting to note that with the additional evidence the jury in the second trial returned a verdict $6,500 larger than in the first trial.

If the various witnesses of plaintiff had not been allowed to testify, plaintiff would have been barred from proving damages. Yet if the Court is wrong in its view as to the non-existence of legal liability on the part of the instant defendant, the defendant wrongfully caused the plaintiff's loss, and it is not in a strong position to complain of the uncertainty of the damages. See *Willmar Gas Co.* v. *Duipinch,* 239 Minn. 173, 53 N. W. 2d 225, 229 (1952).

The Minnesota Supreme Court has said that "the only objection to loss of profits as a measure of damages is the

possibility that such a measure might be too uncertain of proof." *Poppen* v. *Wadleigh,* 235 Minn. 400, 51 N. W. 2d 75, 78 (1952). As indicated above, the evidence of loss of profits was sufficiently certain so that the jury could reasonably make the finding it did. See 4 Restatement, *Torts* § 912 comment (d). Lost profit cases are never easy of resolution but "the tendency of the [Minnesota] court has been to ascertain damages, when an actual wrong has been done, though doing so involves labor, rather than to deny relief with the easy statement that the damages sought are too speculative and conjectural or too remote to permit a recovery." *Ellis* v. *Lindmark,* 177 Minn. 390, 225 N. W. 395, 397 (1929). See *Hendrickson* v. *Grengs,* 237 Minn. 196, 54 N. W. 2d 105, 109 (1952).

The Court would be less than frank if it did not admit to being troubled by the evidence of lost profits. However, two juries have considered the evidence and it is likely that a third would reach a similar result unless all testimony as to lost profits was ruled out, a step which would not be proper. As Judge Holtzoff has said:

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances,

> *a fortiori* a second verdict reaching substantially the same result on practically the same evidence should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. *Frank* v. *Atlantic Greyhound Corp.*, 177 F. Supp. 922, 923 (D. C. 1959), *aff'd* 280 F. 2d 628 (D. C. Cir. 1960).

A discussion of causation by this Court after strongly indicating its views as to the absence of legal liability in the case in granting a judgment N.O.V. emphasizes the unreality involved in a conditional ruling on the alternative motion. See *Momand* v. *Universal Film Exchange, Inc.*, 72 F. Supp. 469, 483 (D. Mass. 1947) (Wyzanski, J.). As at several other points, plaintiff's legal theory as to how Faribault related to the other sixteen contracts was somewhat unclear. However, if there was liability for defendant's actions in Faribault, we fail to see how the liability could end there. Several contracts were cancelled at Faribault by other fair boards because of what occurred there; moreover, plaintiff could reasonably expect that had he attempted to perform at other fairs similar things would have happened since he would remain on the "unfair list."

Defendant's alternative motion for a new trial is denied.

July 23, 1964.

EARL R. LARSON.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,856

William Smith, doing business as Smith Entertainment Agency and as Smith & Dale Circus,
Appellant,

v.

American Guild of Variety Artists,
Appellee.

No. 17,857

American Guild of Variety Artists,
Appellant,

v.

William Smith, doing business as Smith Entertainment Agency and as Smith & Dale Circus,
Appellee.

Appeals from the United States District Court for the District of Minnesota.

[AUGUST 9, 1965.]

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

Appendix B.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by plaintiff William Smith from an order of Judge Larson sustaining the motion of defendant American Guild of Variety Artists (AGVA) for judgment n.o.v. setting aside a jury verdict for the plaintiff and from final judgment dismissing plaintiff's complaint. Plaintiff is also appealing from the trial court's refusal to submit to the jury for consideration an action based upon secondary boycott and from the refusal of the trial court to submit to the jury his claim for punitive damages.

AGVA by cross-appeal raises the issue that the trial court erred in conditionally denying defendant's alternate motion for a new trial based upon the ground that there is no substantial evidence to support the fact of damage or the amount thereof and upon the additional ground that the court's interrogation of certain witnesses was improper and prejudicial.

This case had been previously tried to a jury with Judge Devitt presiding. The jury returned a verdict for the plaintiff for $15,000. Judge Devitt granted defendant's motion for a new trial upon the ground the verdict was excessive, stating that in his view the evidence would not support a verdict for more than $3,000. This case was again tried to a jury before Judge Larson. The jury returned a verdict of $21,500.

Plaintiff's complaint sets out two causes of action. The first cause of action is based upon failure to arbitrate. Both Judge Devitt and Judge Larson dismissed this cause of action. No appeal is taken on the failure to arbitrate issue and hence no consideration thereof is required.

In the second cause, plaintiff seeks damages based upon (1) violations of 29 U.S.C.A. § 158(b) (4) (ii) by secondary boycott; (2) wrongful interference with contractual relations.

Appendix B.

A summary of some of the background facts appears desirable. William Smith had produced grandstand shows and circuses for fairs and celebrations since 1956. He had contracts with numerous union performers and had executed contracts with seventeen fairs for the presentation of a grandstand show or circus during the 1962 season.

Smith had obtained contracts for a number of performances in Canada and Alaska for the spring of 1962. Under his contract with AGVA he agreed to hire only union acts and to cover wages and transportation with security posted with the defendant and to make certain welfare contributions to defendant for the performers. He failed to comply with the security and welfare provisions with respect to the Canadian trip and he also failed to fulfill his obligation to pay the performers the full salaries due them. There is much controversy in the record as to what occurred in Canada. Smith contends that some of the performers attempted to take the show away from him. Plaintiff did leave the performers in Canada in the middle of the tour. The show continued its tour under the management of some of the employees.

Plaintiff had contracts to produce a show advertised as a twenty-act circus at seventeen fairs in the midwest during the summer of 1962. Many of the performers on the Canadian tour were under contract to plaintiff to play at such fairs. The fair run was to commence at the fair at Faribault, Minnesota, on July 28, 1962, with an afternoon and evening show on that date and an evening show the following day. On July 17, prior to the first performance at Faribault, a meeting of the defendant organization was held at Minneapolis to consider complaints made by plaintiff's performers arising out of the Canadian tour. As a result thereof, plaintiff was put on the unfair list for nonpayment of salaries due and was notified of such

action by telegram, and notice thereof was also given to the seventeen fairs with whom plaintiff held contracts.

Herbert Meyers, AGVA manager of defendant's Minneapolis branch, contacted the Faribault Fair Board by telephone and later had a personal meeting with the Board. Board members testified that Meyers told them that even if plaintiff wanted to produce a non-union show, he could not do so because the defendant would not permit it and they also said that the AGVA was going to take over the contract. The Fair Board was advised that plaintiff would not be permitted to put on the show and that the fair would be picketed. The Board was also urged to cancel plaintiff's contract and to enter into a contract for the shows with the defendant. The Board refused to cancel the contract.

AGVA put up a picket line at the grandstand on the afternoon of July 26. The pickets were placed so that customers wishing to purchase grandstand tickets had to cross the picket line. Plaintiff's circus was not scheduled to, and in fact did not, perform until Saturday afternoon, July 28. The picketing continued on Thursday and on all day Friday and Saturday, and on part of Sunday. An automobile thrill show on Thursday night and a wrestling show on Friday night, with which plaintiff had no connection, were picketed.

Plaintiff assembled non-union acts for the Faribault engagement. After the Saturday afternoon performance, the Fair Board canceled plaintiff's contract for the remaining shows on the stated ground that the number and quality of the acts did not conform to the contract. Within a short time thereafter, plaintiff's sixteen other fair contracts were canceled. Additional facts will be set out in the course of the opinion.

Appendix B.

THE SECONDARY BOYCOTT ISSUE.

Judge Larson, upon defendant's motion made at the close of all of the evidence, dismissed plaintiff's cause of action based on secondary boycott. In explanation of such action, the court states:

> "To summarize the basis for this decision: The dispute between plaintiff and defendant was a labor dispute within the meaning of 29 U.S.C.A. § 152(9); the strike had the objective of placing direct economic pressure on the primary employer, Smith, in order to resolve the dispute arising from his breach of the collective bargaining agreement. Such a strike in support of lawful demands is permissible.
>
> "The common situs situations present the most difficult problems of distinguishing between primary and secondary activity. The instant activity was not directed at the Fair Board but at the primary employer. The manner of picketing met the standards for lawful primary activity set out in *Matter of Sailors' Union of the Pacific* (Moore Dry Dock), 92 N.L.R.B. 547, given the rather unusual business involved in the instant case.
>
> "Plaintiff argued that defendant 'threatened, coerced or restrained' certain persons. The picketing was primary and did not become illegal secondary activity even if threats were involved. *United Steelworkers of American* v. *N.L.R.B.*, 376 U.S. 492 (1964)."

We agree with Judge Larson's view that Smith's failure to comply with his contract with AGVA with respect to paying wages due employees, welfare payments and the posting of security, afforded AGVA a right to place Smith on the unfair list and to strike in support of its lawful demands. However, we do not consider the evidence here to be so great as to warrant a determination by the court

as a matter of law that the strike conducted was a primary strike directed only at the employer Smith. 29 U.S.C.A. § 158 (b) (4) (ii) makes it an unfair labor practice for a labor organization or its agents:

> "(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> > (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, business with any other person, or forcing or processor, or manufacturer. or to cease doing requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: PROVIDED, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

The statutory proviso clearly protects primary picketing. The problem presented is whether the court was justified in determining as a matter of law that the strike was a primary strike.

The picketing took place on the Fair's premises. We believe this to be a common situs situation where a neutral employer is engaged along with a struck employer in different activities on the same premises. In *NLRB* v. *International Hod Carriers,* 8 Cir., 285 F.2d 397, 400-401, after quoting from *NLRB* v. *Denver Bldg. & Const. Trades Council,* 341 U. S. 675, we stated:

> "To resolve the numerous problems which stem from common situs activities, and in order to protect the

Union's right to carry on its lawful activities against the primary employer, as well as to adequately protect the neutral employers and employees, strangers to the dispute, certain evidentiary standards were evolved for distinguishing between primary and secordary picketing at a common situs. These may be stated as the 'Moore Dry Dock tests,' Sailors' Union of the Pacific, AFL and Moore Dry Dock Company, 92 N.L.R.B. 547. Under the situation presented in that case, the Board ruled that picketing the premises of a secondary employer is primary if it meets the following conditions:

> " 'a) The picketing is strictly limited to times when the *situs* of dispute is located on the secordary employer's premises; b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* c) the picketing is limited to places reasonably close to the location of the *situs;* and d) the picketing discloses clearly that the dispute is with the primary employer.' "

The evidence before us does not meet the Moore Dry Dock tests set out in the foregoing quotation, particularly (b) which relates to the primary employer at the time being engaged in his normal business activity at the situs. As heretofore set out, the picketing at the grandstand commenced two days before plaintiff's scheduled performance was given and continued after defendant became aware that plaintiff's contract had been canceled. Such picketing interfered with the Thursday and Friday grandstand shows with which plaintiff had no connection whatsoever and the picketing also interfered with grandstand concessions.

Moreover, prior to the opening of the fair, defendant made repeated demands that plaintiff's contract be canceled and that a show sponsored by defendant be substi-

tuted. When such efforts failed, Meyer stated "this leaves me no alternative but to picket the fair." The picket signs read, "Do Not Patronize CIRCUS at this FAIR." The words "at this" were much smaller than the other words making the sign appear to read "Do not patronize Circus Fair."

If as we have held the picketing does not fall in the category of lawful primary picketing, a violation of § 158 (4) (B) is established by proof that an objective of the strike is to compel a neutral employer to cease doing business with the struck employer. In considering the "an object test" in *Local 618* v. *NLRB,* 8 Cir., 249 F.2d 332, 334, we said:

> "The 'an object' test, applied here by the Board, is recognized as a proper test in cases where the picketing involved was not lawful primary picketing. *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689, 71 S.Ct. 943, 95 L.Ed. 1284; *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board,* 341 U.S. 694, 700, 71 S.Ct. 954, 95 L.Ed. 1299. The Court holds that it is not necessary to find that the sole object of the strike was that of inducing a neutral employer to cease doing business with another person."

We conclude that there is an evidentiary basis in our present case for a jury finding that a common situs situation is here presented, that the strike is not a lawful primary strike and that an objective of the strike was to compel the Fair Board to cease doing business with the plaintiff. The court erred in directing a verdict on the secondary boycott issue and in failing to submit such issue to the jury. Such error requires a reversal.

Appendix B.

UNLAWFUL INTERFERENCE WITH CONTRACTUAL RELATIONS ISSUE.

Minnesota courts, as well as courts generally, have long recognized the existence of a common law action based upon tortious interference with contractual relations.

> "The courts hold with substantial unanimity that the wrongful and malicious interference by a stranger with existing contract relations between others, which causes one of the parties to breach the contract, is a tort, and that the injured party may recover damages therefor." *Carnes* v. *St. Paul Union Stockyards Co.*, 205 N.W. 630, 631.

See *American Surety Co.* v. *Schottenbauer*, 8 Cir., 257 F.2d 6; *Continental Research, Inc.* v. *Cruttenden, Podesta & Miller, D.Minn.*, 222 F.Supp. 190; *Wolfson* v. *Northern States Management Co.*, 299 N.W. 676. See generally 86 CJS Torts, § 44; 30 Am. Jur. Interference, §§ 18-32; annot. 26 A.L.R.2d 1227. But if the interference is justifiable or privileged, there is no liability. See *Royal Realty Co.* v. *Levin*, 244 Minn. 288, 69 N.W.2d 667; *Sorenson* v. *Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754. The Minnesota court has commented upon justification: "'To justify an act of interference of this sort it must be founded upon some lawful object.'" *Sorenson* v. *Chevrolet Motor Co.*, supra at 755. The malice required by the Minnesota court has been defined as follows:

> "The term 'malice', as used in the class of cases mentioned, means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right. Whether a wrongdoer's motive in interfering is to benefit himself, or to gratify his spite by working mischief to another, is immaterial; malice in

the sense of ill will or spite not being essential." *Carnes* v. *St. Paul Stockyards Co.,* 205 N.W. 630, 631-32.

"'"Interference with Contract Relations," includes not merely the procurement of a breach of contract, but all invasion of contract relations, so that any act injuring or destroying persons or property which retards, makes more difficult or prevents performance, or makes performance of a contract of less value to the promisee, may fall within its scope, it may be said that the interest in a contract being a property right, a party thereto has a right of action against persons who are by their conduct substantially interfering with the performance thereof.'" *Johnson* v. *Gustafson,* 277 N.W. 252, 254.

The trial court, after it had submitted the contractual interference issue to the jury and a verdict in favor of the plaintiff had been returned, sustained the defendant's motion for judgment n.o.v. The trial court, citing 1 Harper and James, The Law of Torts, § 6.13, recognizes that contractual relations are interfered with deliberately and intentionally in a strike and that a prima facie tort is thus made out. The court bases its decision on the premise that where the action causing the contractual interference is protected by a labor statute, the rights of labor under such statute must be protected and that hence the issue in such type of case is whether the labor statutes afford justification for the action complained of. We agree that a right to strike falling within the protection of national labor statutes would afford a defense of justification or privilege to a contractual interference action. The court states:

"The crux of the instant case is to what extent the actions of the defendant have exceeded its privilege,

and it is on this point that plaintiff has failed to establish a case. As indicated above, the picketing was for lawful objectives, and it was carried on in a lawful manner. The test of economic strength contemplated by our industrial relations system as a means of resolving conflicts between employers and unions may well result in one of the parties being brought to his knees although mutual self-interest and relative strength militates against such a result in the vast majority of cases. Yet this was the result in the instant case. The defendant's picketing resulted in plaintiff's inability to perform his contract. In furthering its own interests defendant harmed the plaintiff, but its conduct was privileged because carried out within the context of a legitimate labor dispute."

Plaintiff raises the issue that the court erred in placing the burden upon him on the privilege issue. The first sentence of the excerpt just quoted lends support to plaintiff's claim that such burden was placed upon him. In *Royal Realty Co.* v. *Levin,* Minn., 69 N.W.2d 667, 673, the Minnesota court recognized "that the burden of proving sufficient justification for the interference rests on the defendants." This view is in accord with the general interpretation. See Annot. 26 A.L.R.2d 1227, 1263-64. Thus it appears that the burden of proof on justification is on the defendant. From a reading of the court's opinion as a whole, we doubt whether the court's decision turned upon the burden of proof issue and we would hesitate to reverse on this ground alone.

Plaintiff's basic contention is that the court erred in determining upon the record before us that justification existed as a matter of law for defendant's picketing of the scope here involved. In *American Surety Co.* v. *Schottenbauer,* supra, this court in considering a Minnesota contractual interference case determined that Minnesota has

adhered to the view that the plea of justification is ordinarily one for the jury.

Congress has by the Taft-Hartley Act granted labor certain rights but it has also defined and proscribed certain unfair labor practices. Union conduct which would constitute an unfair labor practice is not privileged. In the preceding division, we have expressed our view that a fact issue is presented on the secondary boycott issue. A violation of the secondary boycott provision is an unfair labor practice. Judge Devitt, who presided at the first trial submitted the secondary boycott issue to the jury and in overruling a motion for judgment n.o.v. stated:

> "A second ground supporting the motion for judgment n.o.v. is that the plaintiff failed to sustain the burden of proof that he was damaged *by reason* of any unfair labor practice under § 8(b)(4). Section 303(b) specifically requires that the action complained of be the proximate cause of the alleged injury. The evidence on this point was sparse. It is not unlikely that the contract termination was largely the result of plaintiff's inability to perform the contract. But the jury's verdict is entitled to great weight, and the party in whose favor the verdict was returned is entitled to all favorable inferences that can be reasonably drawn from the evidence."

The evidence on such issue was at least as strong at the second trial.

Additionally, we note that § 8(b)(1) of the Taft-Hartley Act, 29 U.S.C.A. § 158(b)(1) provides:

> "It shall be un unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . ."

Appendix B.

Section 7 of the Act (29 U.S.C.A. § 157) provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (Emphasis added.)

The effect of Section 8(B)(1) was described by the chief sponsor of the Act, Senator Taft, in this manner:

> "'The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them [that is, the employees not the public]; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment.'" *Capital Service, Inc.* v. *NLRB*, 9 Cir., 204 F.2d 848, 853.

See *Automobile Workers* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 272. The Supreme Court has

consistently recognized that Section 8(b)(1) was not the exclusive method of controlling threats, coercion and violence against employees by labor unions. See *Automobile Workers* v. *Wisconsin Employment Relations Board*, supra; *United Workers* v. *Laburnum Contr. Corp.*, 347 U.S. 656.

The evidence here would support a finding that the union's activities went well beyond peaceful primary picketing. There is substantial evidence of threats of physical harm made by Meyers and other pickets to non-union employees and fair officials which placed them in fear for their safety. When Smith's union employees went on strike, he employed non-union actors to put on the show. There is substantial evidence from which the jury could find that the defendant threatened and coerced such non-union actors with the result that some refused to perform and the performance of others was impaired. An inference could be drawn that the substandard performance could be attributed to threats made by the pickets. Moreover, the Secretary of the fair testified that Meyers told him the dog man was pretty mad and that "he would hate to be in my shoes because I might not be living tomorrow."

The Fair Board found it to be necessary to arrange for additional police protection. It is true that the Fair Board in canceling the contract assigned the reason that the performance did not conform to the contract. The threats made could well be found by the jury to be an important factor in the termination of Smith's contract. Picketing beyond lawful primary picketing could also have played a part in inducing the Fair Board to cancel the contract. The jury could have found that AGVA's actions proximately caused plaintiff's damage. It is not necessary that such action be the sole or primary cause of the damage but only that it be a substantial cause. See

Haverhill Gazette Co. v. *Union Leader Corp.*, 1 Cir., 333 F.2d 798, 805-06; *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 9 Cir., 252 F.2d 473, 479; Restatement, Torts § 431.

Plaintiff presented evidence that the inferior performance and difficulty at Faribault caused cancellation of the sixteen favorable contracts he had with other fairs. The damage issue submitted to the jury relates to the profits at Faribault and the sixteen other fairs. Judge Larson in his opinion states:

> "[I]f there was liability for defendant's actions in Faribault, we fail to see how the liability could end there. Several contracts were cancelled at Faribault by other fair boards because of what occurred there; moreover, plaintiff could reasonably expect that had he attempted to perform at other fairs similar things would have happened since he would remain on the 'unfair list.'"

Plaintiff made a prima facie case of contractual interference. We believe the issue of whether defendant's conduct was justified or privileged was one of fact for the jury's determination. The court erred in determining as a matter of law that the defendant's conduct was privileged and in granting judgment n.o.v.

PUNITIVE DAMAGES.

Plaintiff urges the court erred in refusing to submit his claim for punitive damages to the jury. The court stated "there is not sufficient evidence as to any claim for punitive damages." Both Judge Devitt and Judge Larson refused to submit the punitive damage issue. *Teamsters Union* v. *Morton*, 377 U.S. 252, 260, holds that damages caused by secondary activities proscribed by § 303 are

limited to actual compensatory damages. There is also an indication that with respect to peaceful secondary activities, federal law has preempted the field and that state law must yield to federal limitations. There is evidence here that the threats and conduct went beyond lawful, peaceful primary picketing. However, the privilege or justification defense appears to turn largely on federal labor law. Plaintiff has pointed out no Minnesota cases holding punitive damages are allowable in actions of this type. We are disposed to accept the considered view of the two experienced Minnesota federal judges who heard this case to the effect that no punitive damages are allowable.

CROSS-APPEAL.

Defendant has appealed from the trial court's order conditionally denying its motion for a new trial. Defendant's principal contention is that the evidence is insufficient to establish the fact of damage or the amount thereof. The court in ruling on the motion stated that the defendant was wrong in its contention that plaintiff's business was newly established. The court further observed that plaintiff had been profitably showing at fairs since 1957 and that it was reasonable to anticipate he would realize some profits from the seventeen fair contracts he held. The court also points out that a great deal more evidence was produced on lost profits at the second trial than at the first trial. Judge Devitt determined that the evidence at the first trial would support some damages but granted a new trial on the basis the damages allowed were excessive. The record here supports the court's determination that the evidence was adequate to establish the fact of damages. For a discussion of applicable standards on the damage issue, see *McCleneghan* v. *Union Stock Yards Co.*, 8 Cir., . . . F.2d

. . . (July 21, 1965). The court did not abuse its discretion in refusing a new trial.

Excessiveness of verdict is a matter basically for determination by the trial court and this court will interfere only in those rare situations where there is plain injustice or a montrous or shocking result. *Lowery* v. *Clouse,* 8 Cir., . . . F.2d . . . (July 16, 1965); *Solomon Dehydrating Co.* v. *Guyton,* 8 Cir., 294 F.2d 439, 446-48.

We have examined defendant's contention that the trial courts independent interrogation of two witnesses on the question of anticipated profits was erroneous and prejudicial and find it to be without merit.

SUMMARY.

On plaintiffs appeal, we hold that the court erred in entering judgment n.o.v. for defendant. The court also erred in withdrawing from the jury plaintiff's cause of action based on secondary boycott.

The case was fairly submitted to the jury by proper instructions on the contractual interference cause of action. Such a cause of action is recognized and enforced under Minnesota law. The instructions adequately advised the jury that the defendant had a right to place plaintiff on the unfair list and to conduct a primary strike. The issue of privilege and justification was fully covered. Two juries have determined that the plaintiff is entitled to recover.

Plaintiff claims the same damages on the secondary boycott and contractual interference causes of action. Plaintiff is entitled to but one recovery for the same wrong. Thus in view of the favorable verdict on the contractual interference cause of action, plaintiff has suffered no prejudice by the court's failure to submit the secondary boycott cause of action.

Upon plaintiff's appeal, we reverse. We affirm on defendant's cross-appeal. This case is remanded to the trial court with directions to vacate its order of dismissal based on the sustaining of defendant's motion for judgment n.o.v. The trial court is directed to reinstate the verdict and enter judgment accordingly.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 808

AMERICAN GUILD OF VARIETY ARTISTS,

Petitioner,

vs.

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUMMARY STATEMENT OF FACTS

Respondent, William Smith, 58, started in the carnival business at 14 and continued to 1956. In 1957 be began producing shows for county fairs using circus acts. His shows increased in size until 1961. In 1961 he began booking larger and better fairs for 1962. His efforts culminated in contracts with 17 of the fair boards of the larger fairs in the five states of Minnesota, Wisconsin, Iowa, South Dakota and Michigan, beginning on July 28, 1962 at Faribault, Minnesota, and playing almost continuously (less travel time) and ending September 1, 1962 at Onekama, Michigan. For this run of shows Mr. Smith engaged A.G.V.A. Union performers on Union contracts. Prior to this run he had taken a circus for a tour of Canada and Alaska. Smith left the show at Edson, Canada, claiming one of the performers, Stebbing, had stolen the show (T. 329-332). When he left he owed the perform-

ers approximately $9,000.00 (T. 303). Most of the performers in the Canadian tour were also on separate contracts to perform on the summer tour commencing at Faribault.

On July 17, 1962 a meeting was held by the A.G.V.A. executive committee. No notice of the meeting was given Smith. At the meeting it was recommended Smith be placed on the unfair list (T. 1014; 1020). Herb Meyers, Minneapolis Branch Manager, sent Mr. Smith a telegram July 20, 1962 notifying him he was on the unfair list for nonpayment of salaries due its members (T. 49). Meyers did not have authority to place a producer (Smith) on the unfair list (T. 1021). This had to come from the national headquarters of A.G.V.A. A letter to this effect was not sent by national headquarters until July 30, 1962, after the Faribault fair (T. 1021).

In the meantime, on July 20, 1962, Mr. Meyers contacted the treasurer and secretary of the Faribault fair board by phone and ordered them to cancel Smith's contract, and when they protested they had a contract with Smith, were told it was void. To their protests that they had to have a show, he told them "they" would take over the contract and put on the same show (T. 445-447; 511-512).

At a meeting with the fair board arranged for the following Monday by Mr. Meyers, he (Meyers) told the fair board Smith was gone and his whereabouts unknown and that he could not and would not produce a show and said, "We're going to take over the contract" (T. 450), and negotiated for the contract, demanding a guaranty. Smith later appeared at this meeting.

At another meeting Monday night at which the fair board informed Meyers that it had been decided to honor Smith's contract, Mr. Meyers said, "You leave me no alternative but to picket your fair" (T. 456), and Meyers agreed this was his intent (T. 1041).

Meyers then sent telegrams to the other 16 fair boards informing them Smith was on the unfair list and contacted at least nine secretaries of the fair boards by phone (T. 748).

Many of the Union performers came to Faribault to work for Smith (T. 342; 412; 1099). Picketing was begun Thursday morning, July 26, 1962 and continued to 10:00 or 11:00 P.M. that night, picketing a thrill show of no connection with Smith (T. 459). They also picketed Friday during other shows having no connection with Smith. On Saturday they picketed Saturday morning and Saturday afternoon. Saturday afternoon the Smith show played and immediately afterward his contract was cancelled and he left the grounds.

After cancellation of Smith's contract the Union again tried to take over his contract. The fair board refused (T. 530; 552; 469). The Union had promised the pickets they would take over Smith's contracts, and if the performers wanted to work, they should stick with the Union (T. 1101).

The pickets continued Saturday night and Sunday. Many times during the week of the fair, Meyers and Stebbing approached fair board members about putting on the show in Smith's stead (T. 524; 526). The pickets carried misleading signs (T. 546).

On Saturday night several of the members of Smith's troupe were so frightened by threats from pickets that they remained in the grandstand until 2:00 A.M. Sunday morning (T. 759; 570; 574; 582; 765). During the fair other performers were threatened: helicopter pilot John Clark (T. 633; 655), trapeze girl Yvonne Stevens (T. 720; 743). The secretary of the Faribault fair board and mayor of Faribault, Frank Duncan, was also threatened. Mr. Duncan asked for police protection (T. 531). Other threats were made and the fair board took special precautions (T. 531; 588).

Smith's remaining performers quit when the Faribault contract was cancelled. Thereafter many of these acts played

fairs with whom Smith had contracts (T. 621; 591; 593).

Thereafter, with the exception of two weeks, respondent Smith was without employment up to the time of trial (T. 92).

This case was originally tried before Judge Devitt and a jury verdict for plaintiff, Smith, returned in the amount of $15,000.00. A new trial was granted on the grounds the verdict was excessive. The case was retried to a jury before Judge Larson. This jury returned a verdict for the plaintiff, Smith, for $21,500.00. Judge Larson granted judgment n.o.v. for the defendant union and on appeal the Circuit Court reversed and reinstated the verdict.

ARGUMENT

I.

Unlawful Interference with Contractual Relations Issue.

A. No Showing Is Made upon Which Relief Can be Granted.

The Circuit Court of Appeals in its decision:

1. Reversed the trial court's judgment N.O.V. for defendant and directed reinstatement of the verdict for plaintiff.

2. Held the trial court erred in withdrawing from the jury plaintiff's cause of action based on secondary boycott. Since the verdict on the first issue was favorable to this respondent, the Circuit Court held it was not prejudiced by the Court's failure to submit the secondary boycott issue.

Issue number 2 above is a moot question because this issue has never been considered by the jury. Almost all of petitioner's brief is directed toward this moot question.

For petitioner's petition to be successful it must first show that the Court erred in reinstating the verdict (number 1 above) and that its decision in this regard decided a federal question in conflict with applicable decisions of this Court.

Petitioner's brief at page 9, Argument I, practically ignores this issue and produces no arguments in support of its contention other than to argue the weight to be given certain evidence and refers in main to evidence considered by the Circuit Court in its holding on the secondary boycott issue (number 2 above). Petitioner cites four cases by this Court which he states are in conflict with the Circuit Court's decision in this matter, but wholly fails to point out wherein they are in conflict. We fail to see wherein they are applicable.

Respondent submits that the petitioner's petition is, therefore, completely inadequate, without merit on this point and should be denied.

B. The Object of the Union Activity Was Not Lawful.

Petitioner in his argument speaks rather defensively of the lawful object of the Union activity and the lawfulness of the strike, this being an essential basis of his argument.

Yet the record is so replete with instances of improper conduct and action of the Union it leaves no room for doubt that the Union had improper motives and objectives.

This is shown by the actions of the Union's branch manager, Herb Meyers.

Mr. Meyers put respondent on the unfair list. He then contacted two members of the fair board, Frank Duncan and Waldo Broberg, and in a series of phone calls and meetings:

1. Demanded of the fair board that they cancel Smith's contract and
2. Insisted that the Union would take over Smith's contract with the fair board and put on a show for the fair board in Smith's place and stead.

In effect, what the Union was doing was to compete with Smith as a producer and attempt to take over 17 county fairs Smith had spent over one year lining up for 1962. This is

amply shown by the following citations: T. 445-451, 488, 524-526, 514-521, 530, 552 and 469.

The evidence is so overwhelming on this point against the Union that there is little doubt of its illegal object.

Certainly the evidence was sufficient for the jury to consider the object of the Union activities. The jury, in two separate trials, considered all the facts and returned substantial verdicts in favor of the plaintiff which shows with little doubt that the Union's objective was to put Smith out of business and appropriate his contracts.

II.

The Secondary Boycott Issue.

The crux of petitioner's argument in regard to the secondary boycott issue appears to be that the Union conducted a peaceful primary strike in a lawful manner.

In contrast, the Circuit Court of Appeals of the Eighth Circuit found that there was evidence upon which a jury could find that said strike was not primary, not peaceful and in violation of 29 *U.S.C.A.* 158(b)(4) in that its object was to compel the fair board to cease doing business with respondent. This finding is amply supported by two jury verdicts for substantial amounts prior to the Circuit Court holding.

Petitioner claims the decision of the Court of Appeals for the Eighth Circuit in this matter is in direct conflict with the decisions of this Court regarding the application of 29 *U.S.C.A.* 187 and 29 *U.S.C.A.* 158(b)(4). It cites as authority for this position *United Steel Workers of America v. N.L.R.B.*, 376 U.S. 492, 84 S.Ct. 899 (1964), and *Local 761, International of E. R. & M. Workers v. N.L.R.B.*, 366 U.S. 667, 81 S.Ct. 1285 (1961).

There is no conflict between the holding of the Eighth Circuit Court in this matter and the *United Steel Workers* case.

The holding of the Eighth Circuit Court is that the trial court was not justified in finding as a matter of law that the picketing was lawful primary picketing. The Eighth Circuit Court found (as the facts disclose) that a common situs problem was presented as the picketing took place on the fair's premises and therefore applied the evidentiary standards for distinguishing between primary and secondary picketing at a common situs. These are commonly referred to as the "Moore Dry Dock Tests," *Sailors Union of the Pacific and Moore Dry Dock Company*, 92 N.L.R.B. 547. Application of these tests indicated the Union's activities did not meet them. The Court then looked to the objective of the Union to see if there was a violation of No. 158(b)(4) and found that there was an evidentiary basis for a jury to so find that a common situs situation was presented, that the strike was not a lawful primary strike and that an objective of the strike was to compel the fair board to cease doing business with the plaintiff.

The *United Steel Workers* case involved a strike at the primary employer's plant and the activity at one of the gates at that plant. This Court held the secondary employees, with whom the picketing employees interfered, were engaged in activities in furtherance of the primary employer's normal business, and picketing directed at such secondary employees did not change a lawful primary strike into an illegal secondary boycott prohibited by 158(b)(4) but that it was protected by the provisions of subsection (b). There is ample evidence in the record that during a great deal of the picketing which occurred in this case Smith had no normal business but the fair board did, and it was this business that was picketed, and that there was ample evidence that the reason this was done was to compel the fair board to cease doing business with Smith, the objective of the Union being to appropriate Smith's contracts.

The facts are replete with incidents which conclusively show that the picketing was aimed at the fair board and not at Smith. Numerous attractions were scheduled for the grandstand during the fair. A Thrill Show was scheduled for Thursday night and wrestling on Friday. On Sunday there was an Auto Show. None of these shows were connected in any manner with Smith. In addition, numerous exhibitors had their exhibits under the grandstand. These also had no connection with Smith. Yet even so, the record shows unequivocably that the Union persisted in picketing these shows and exhibitors right through Sunday, even though Smith had left the grounds on Saturday afternoon. The pickets carried signs that could be construed to indicate they were picketing the fair and the circus. Furthermore, the Union placed the fair board on the unfair list (T. 491, 542).

All of the above would indicate the object of the Union was to interfere with normal operations of the fair board with the purpose of compelling the fair board to cease doing business with Smith and to appropriate his contracts and, therefore, hardly within the holding in the *United Steel Workers* case. Nor is the *Local 761, International of E. R. & M. Workers v. N.L.R.B.*, above cited, of any comfort to petitioner. In that case this Court said, "The application of the Dry Dock tests, to limit the picketing effects to employees of the employer against whom the dispute is directed, carries out the 'dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' N.L.R.B. v. Denver Building and Constr. Trades Council, 341 U.S. at page 692, 71 S.Ct. at page 953."

CONCLUSION

Petitioner has wholly failed to show conflict with the decisions of this Court.

Petitioner produces a vacuum of evidence and law to substantiate his contentions on the issue of interference with contractual relations, yet his case cannot stand on the secondary boycott issue as this was not presented to the jury.

On the secondary boycott issue there was ample evidence for a jury to consider in their determination whether, from the facts, the Union activity was directed against Smith or against the fair board. However, this issue was never presented to the jury. The appeals court merely ruled that the trial court was in error in not submitting this issue to the jury.

Respondent suggests that the real "warp and woof" to which petitioner alludes is the rather dismal prospect that the time has arrived when payment of the judgment can no longer be delayed but must be made. A task very distasteful to petitioner and undoubtedly one the mere thought of which has prompted many a petition for writ of certiorari to be hastily drawn and submitted. There are many grounds upon which a writ may issue; however, prolongation of agony does not happen to be one of them.

We therefore submit that the petition should be denied.

Respectfully submitted,

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END